COMMONWEALTH OF KENTUCKY
SUPREME COURT

NO. 2014-SC-000512-D

AEP INDUSTRIES INC. — APPELLANT

v.

B.G. PROPERTIES, INC. — APPELLEE

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed this 29th day of September, 2015, to the following: Honorable Steve Wilson, Warren Circuit Court, 1001 Center Street, Suite 404, Bowling Green, Kentucky, 42101; Charles E. English, Jr., Esq., Michael S. Vitale, Esq., David W. Anderson, Esq., English, Lucas, Priest & Owsley, LLP, P.O. Box 770, Bowling Green, Kentucky, 42102-0770; and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40602.

GLENN A. COHEN

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. BG'S VOLUNTARY ACCEPTANCE OF AEP'S $3,426,012.63 PAYMENT RENDERS BG'S APPEAL MOOT

BG now claims that its appeal is not moot because BG was compelled to transfer the Subject Property to AEP, rather than doing so voluntarily. In support, BG principally relies upon several cases that involved foreclosures and judicial sales, and discuss the ramifications on the purchaser's title where the former property owner pursues and wins an appeal after a judicial sale. *See* BG Brief at 20-25.[1] BG's reliance on these foreclosure-sale cases, however, is misplaced, because the instant case does not involve such a forced judicial foreclosure where the property owner was stripped of real property without just compensation. Quite the opposite, here, AEP paid at closing, and BG voluntarily accepted (and kept) payment totaling $3,426,012.63 for the Subject Property. In exchange for this payment, BG gave AEP a warranty deed, an act that materially distinguishes this case from the foreclosure cases and obviates any quibbling about the quality of AEP's title.

Furthermore, the purchase price in this case was not derived from some public foreclosure auction or other statutory mechanism, but instead by precisely the objective contractual mechanism for which the parties had bargained – *i.e.* an independent appraisal, performed by a qualified real estate appraiser who was selected and agreed upon by the parties (*i.e.*, the independent third appraiser). More importantly, BG could have rejected that appraisal (and AEP's multi-million dollar payment), and exercised its legal right to seek a stay of the Circuit Court Order and post a *supersedeas* bond. But instead, BG knowingly and voluntarily accepted the benefit of the order (*i.e.*, the

[1] BG summarily claims that the majority of states hold that an appeal is not moot by its performance of the order and the transfer of the real property. AEP disagrees, relying on the numerous cases it cited in its Brief which conclude to the exact opposite.

$3,426,012.63 payment), pocketing AEP's money and giving AEP a warranty deed, with BG's conduct serving to estop it from pursuing this subsequent appeal. By accepting the benefits of the Circuit Court Order, BG has made this appeal moot as a matter of law.

The error of BG's analysis is illustrated by the case of *Rose v. Cox*, 179 S.W.2d 871 (Ky. 1944), on which AEP relied in its principal Brief. BG now attempts to distinguish *Rose* from this case at pages 20-21 of its Brief by emphasizing that AEP is not a stranger to this litigation, as was the subsequent purchaser in the *Rose* case, and asserting that AEP cannot therefore rely on the validity of its title to the Subject Property.

What BG cavalierly dismisses, however, and what is dispositive in AEP's favor, is that AEP is not a *pendente lite* purchaser, as were the buyers in *Rose* and the authority discussed therein, because AEP did not acquire title of the Subject Property through a judicial decree after a commissioner's sale. Instead AEP acquired title at a traditional closing where BG voluntarily gave AEP a warranty deed in exchange for $3,426,012.63. The importance of this distinction is set forth plainly on the face of the *Rose* decision itself, quoting from the much earlier case of *Clark's Heirs v. Farrow*, 49 Ky. 446, 10 B.Mon. 446 (Ky. 1850):

> And we barely remark in addition, that a title passed by commissioner's deed under a decree of specific performance and other similar cases, stands upon a different ground from a that of a title derived under a decree of sale, and an actual sale; because, in the former case, the conveyance of title rests wholly on the decree, and is the same as if it existed in the decree alone, there being no meritorious act done under the authority of the decree which might give additional efficacy to the conveyance.
>
> But in other cases, as of a sale under a decree, the purchase itself is a meritorious act, authorized by the decree and creating an equity, and it is a matter of interest to all parties, and to the public, that such sales, if fairly made, should be sustained, and they are sustained, though such decree be afterwards reversed.

Under *Rose* and the authorities on which it relies, BG's references to foreclosure-sale cases to support its appellate claims has been squarely rejected by the Kentucky courts.

Instead, courts apply the "acceptance of the benefits" doctrine to bar a party like BG, who has already reaped the fruit of a judgment, from later challenging it, applying estoppel principles. *See Trees v. Lewis*, 738 P.2d 612, 613 (Utah 1987) ("As a general rule, one who accepts a benefit under a judgment is estopped from later attacking the judgment on appeal, and one who acquiesces in a judgment cannot later attack it."); *Cottrell v. Prier*, 231 P.2d 788 (Or. 1951) ("The right to proceed on the judgment and enjoy its fruits, and the right of appeal, are not concurrent; on the contrary, they are totally inconsistent. An election to take one of these courses was, therefore, a renunciation of the other."); *see also Rosen v. Rae*, 647 P.2d 640 (Az. Ct. App. 2011) (the Arizona Court of Appeals found that the acceptance of the benefits worked an estoppel and prohibited the seller from also appealing the order).

Here, BG concedes that a voluntary acquiescence to convey property might preclude an appeal; but BG now claims it was somehow under compulsion to convey the Subject Property. *See* BG Brief at 25-27. BG's claims, however, are wrong because they ignore the availability of the bonding procedure – which was specifically referenced in the Circuit Court Order – which would have stayed the Circuit Court Order pending BG's appeal. The Civil Rules offered BG a clear avenue to forestall specific performance, but BG decided not to protect its appeal by exercising its legal rights to seek such a stay, instead voluntarily choosing to take AEP's $3,426,012.63 payment. Furthermore, BG cannot complain that hardship or financial exigencies somehow made such a bond

impossible or constituted coercion, because BG never even asked the Circuit Court (or anyone else for that matter) to set a bond.[2]

II. BY TRANSFERING THE SUBJECT PROPERTY TO AEP, BG MADE APPELLATE RELIEF IMPOSSIBLE, THUS MAKING THE APPEAL MOOT

BG's conduct also has made restitution impossible. BG dismisses AEP's concerns about the impossibility of unscrambling the appellate egg simply by stating that AEP acted at its peril in improving the property and abandoning other opportunities, since it should have known that a reversal on appeal could have caused the Circuit Court Order to be reversed. But BG neglects the fact that AEP has only done what the owner of any real property is entitled to do, and the changed condition of the property (whether for better or worse) makes any restitution claim by BG fundamentally impossible to administer. In addition, it is now impossible to resurrect AEP's option to purchase the substitute Ohio property. No court could fashion a remedy that would restore the *status quo ante*. This further renders this appeal moot.[3]

Neither this Court nor the Circuit Court can restore the parties to their pre-litigation position. The equitable remedy of restitution that BG now ostensibly seeks has been rendered impossible not by any judicial sale or mandatory conveyance, but instead by BG's affirmative decision to take AEP's money and to give AEP a deed. The impossibility of restitution again flows back to BG's calculated decision to take AEP's money, and to give AEP a warranty deed. Once this was done, AEP was fully entitled to

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[2] BG baldly claims coercion here, but there is no evidence that it was financially unable to suspend the Circuit Court Order, and BG never asked the Circuit Court to stay that Order. Quite the contrary, BG instead rushed to deposit AEP's money during the calendar year of the Circuit Court Order, and to obtain the additional tax benefits associated with doing so.

[3] The premise that a judgment debtor can recover in restitution from a judgment creditor is what BG has hung its proverbial hat on throughout the progress of this appeal. It is true, but it isn't relevant, because this is not a case where the *res* consists of money.

improve and renovate the facility, and to forego its option to move to an alternate location. The consequences of BG's choice cannot now be undone, in law or in equity.

This is exactly why the majority of jurisdictions (as set forth in AEP's principal Brief) hold that once the parties perform, as they have in this case, the matter is complete and the appeal is moot.

III. BG'S ARGUMENTS REGARDING AEP'S APPRAISAL ARE WRONG AND IRRELEVANT

The Court of Appeals Opinion at page 7 erroneously held that this case should be remanded so that the Circuit Court could reconsider BG's claims that the nonbinding AEP Appraisal "did not consider the highest and best use of the industrial property and the value of the special features and fixtures thereof as mandated by Section 4 of the Option."[4] Importantly, BG does not dispute, nor could it, that the AEP Appraisal and the BG Appraisal are actually identical on those two issues as identified in the Court of Appeals Opinion. In response, however, BG now claims that either AEP somehow forever waived its right to assert that the parties' nonbinding appraisals are the same on those two issues and/or that such an undisputed fact is now irrelevant because AEP sought specific performance, *i.e.*, the appointment of the independent third appraiser. *See* BG Brief at 33-34.

BG's arguments, however, are not only without merit, but they also crystalize exactly why this Court should reinstate the Circuit Court Order. AEP never waived its right to assert that the parties' nonbinding appraisals are virtually the same on the two issues raised in the Court of Appeals Opinion. Quite the opposite, AEP has repeatedly

[4] As discussed in AEP's Brief, at 27-30, the Court of Appeals Opinion is wrong because, among other reasons, (i) the Circuit Court did, in fact, consider and reject these BG arguments; and (ii) the nonbinding AEP Appraisal and the nonbinding BG Appraisal were basically identical as to highest and best use and the special features and fixtures and, therefore, BG cannot claim that the AEP Appraisal was defective.

raised these very points all along in this litigation, including to the Circuit Court, and the Circuit Court agreed – which is, in part, why the Circuit Court ordered the independent third appraisal. Similarly, it is BG – not AEP – that would be estopped from claiming that the AEP Appraisal is somehow wrong. Importantly, the BG Appraisal was the first appraisal, and is the exact same as the AEP Appraisal (which came later). *See* AEP Brief at 28-30. BG cannot now "disavow" its own nonbinding appraisal in order to, *post facto*, avoid specific performance of the Option.

Finally, the entire point of the Option is to avoid such costly, manufactured litigation over nonbinding appraisals which, at the end of the day, have no material impact on the only material issue in this case: the final purchase price of the Subject Property. In fact, the entire negotiated, agreed upon process set forth in the Option is predicated on the fact that the parties probably would not agree with each other's nonbinding appraisal, and the parties would conclude to different values (with the seller likely higher, and the buyer lower). But instead of having the parties waste untold resources litigating for years the merits of those two nonbinding appraisals – as the Court of Appeals Opinion and BG now would have done – the Option resolves this problem very simply with the appointment of the independent third appraiser. Once the first two appraisals do not yield an agreement, as happened here, the only appraisal that matters under the Option is the independent third appraisal.

Here, all the Circuit Court did was correctly enforce the parties' Option, as written, and appoint the independent third appraiser and enforce his conclusions – nothing more, nothing less. Remanding this case for further hearing or a trial on the two nonbinding appraisals, as BG now demands, is not only a waste of time and resources, but renders the Option – and other contractual provisions just like it – utterly

meaningless. The Court of Appeals opinion, if permitted to stand, will effectively require the parties to agreements such as these to litigate the merit of preliminary, non-binding appraisals, before obtaining a third, binding appraisal. This would render ineffectual these contractual provisions, which are common and clearly designed to deter litigation. This has widespread implications, incentivizing recalcitrant parties to litigate, rather than adhering to their plain contractual obligation, which is to turn the question of valuation over to a third appraiser.

IV. THE INDEPENDENT THIRD APPRAISAL WAS PROPER

Pursuant to the Option, the only appraisal in this case that is binding on the parties is the independent third appraisal. Here, the parties stipulated to the appointment of Mr. Pritchett as the independent third appraiser, who timely issued the independent third appraisal.[5]

BG disagreed with the independent third appraisal because BG wants a higher value. The Circuit Court then specifically heard, and rejected, each and every one of BG's complaints regarding the independent third appraisal. Importantly, on December 14, 2012, BG even submitted to the Circuit Court a proposed order setting forth the exact same erroneous factual claims regarding the independent third appraisal (as well as the other two non-binding appraisals) that BG now makes to this Court and asking the Circuit Court to enter BG's proposed order. The Circuit Court then specifically rejected BG's proposed order and erroneous findings of fact and, instead, entered the Circuit Court Order. Thus, BG cannot claim to this Court that the Circuit Court did not consider (and rule against) BG's various claims regarding the three

[5] BG now attempts to suggest to this Court that Mr. Pritchett was somehow thrust upon them, even though it was BG, not AEP, who insisted on Mr. Pritchett being appointed as the independent third appraiser. Regardless, BG at least admits it was the parties, not the Circuit Court, who jointly chose Mr. Pritchett. *See* BG Brief at 8.

appraisals. Furthermore, there is no reason whatsoever to remand this case so that the Circuit Court can reject those very same erroneous BG arguments yet again.[6]

Furthermore, the Circuit Court was correct to reject BG's erroneous claims regarding the independent third appraisal. For example, BG claims that the independent third appraisal did not include the "special features and fixtures." That is simply not true. Mr. Pritchett specifically testified that he included every single "special feature and fixture" that BG requested to be included; and even a cursory review of the independent third appraisal shows that the values of those "special features and fixtures" were specifically set forth on pages 33-34 of the independent third appraisal. *See* Pritchett dep at 88 (RA 1127).

BG also claims that Mr. Pritchett later recanted in his deposition that he included the value of all the "fixtures." *See* BG Brief at 8-9. But the Circuit Court correctly concluded that such a BG claim misrepresents Mr. Pritchett's testimony. Instead, what Mr. Pritchett actually stated was that he (correctly) did not include the value of the personal property "trade fixtures," such as large machinery and equipment, silos, and equipment towers, because AEP – not BG – already owned them. *See* Pritchett dep at 83-85 (RA 1126-1127). If AEP's personal property had been included in the independent

[6] BG now claims that the Circuit Court Order was premature because the Circuit Court Order did not expressly address all of BG's arguments. But BG waived any such claim that the Circuit Court's findings of fact were somehow inadequate because BG failed to request additional findings, as required by CR 52.04, and as mandated for appellate consideration. "CR 52.04 requires a motion for additional findings of fact when the Circuit Court has failed to make findings on essential issues. Failure to bring such omission to the attention of the Circuit Court by means of a written request will be fatal to an appeal." *Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004), *citing Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). Here, BG did not ask the Circuit Court to reconsider, and chose instead to quickly proceed to a closing, pocketing the spoils of the judgment of which it now complains.

third appraisal, then AEP would be paying BG twice for the very same personal property.[7]

Similarly, BG's manufactured "Price Elements" on pages 3-4 of BG's Brief were also rejected. Nowhere in the Option, Kentucky law, or anywhere else for that matter, is there a requirement that the final purchase price must include such things as AEP's potential costs to relocate, the loss of AEP business during relocation, or the "unique value to AEP of retaining uninterrupted possession of the Premises upon exercise of its option to purchase." *See* BG's Brief at 3-4. As further compelling evidence that BG's "Price Elements" are made-up, even the BG Appraisal did not include any of these newly manufactured "Price Elements." Regardless, Mr. Pritchett explained, under appraisal methodology these manufactured "Price Elements" have no impact whatsoever on the fair market value of the Subject Property. *See* Pritchett dep at 122-123 (RA 1136).

BG also complains that Mr. Pritchett somehow acted improperly in determining the square footage for the subject building. However, what BG also fails to tell this Court is that at the September 13, 2012 meeting with Mr. Pritchett the parties specifically instructed Pritchett to use 167,000 sf. Regardless, the difference is a mere 415 sf[8] and, thus, immaterial.

Likewise, BG's complaint regarding the rail spur is also without merit. The portion of the rail spur (approx. 2,750 lineal feet) that BG now complains about is not

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[7] BG even agreed that AEP's personal property should NOT be included in the independent third appraisal. For example, the list BG prepared and provided to Pritchett of the purported "special features and fixtures" does not include any of the machinery, equipment, silos, and equipment towers owned by AEP. *See* Pritchett dep at 85-87 (RA 1127).

[8] BG's appraiser concluded to 167,415 sf for the subject building (BG's appraisal at p. 4 (Exhibit A)); and AEP's appraiser concluded to 166,865 sf (AEP's appraisal at viii (Exhibit B)). Pritchett ultimately used 167,000 sf (Final Appraisal at 4 (Exhibit A)) – a mere 415 sf difference. The independent third appraisal concluded to a value of approximately $26.65 per sf. Thus, the 415 sf difference BG now bemoans equates to a mere $11,059 in disputed value (415 sf x $26.65 = $11,059).

even located on the Subject Property but, instead, is located on a different adjacent parcel of property owned by a railroad company. *See* Pritchett dep at 104-105 (RA 1131-1132). BG had no more of a right to sell to AEP that 2,750 lineal feet of rail spur owned by the railroad company than it does to sell AEP the Brooklyn Bridge.

Finally, BG's complaint about the $641,000 roof deduction made in the nonbinding AEP Appraisal is irrelevant and moot. Among other reasons, the independent third appraisal took no such roof deduction; and, as a result the Circuit Court held that this roof issue was resolved in BG's favor in the final purchase price. *See* December 19, 2002 Circuit Court Order at ¶9.

Put simply, all of these BG-manufactured issues with the independent third appraisal were already raised by BG, and correctly rejected by the Circuit Court, because they have no factual or legal merit. Therefore, the Circuit Court's order is correct and should be reinstated.

CONCLUSION

For the reasons set forth herein as well as in its principal Brief, AEP respectfully requests that this Honorable Court enter an order reversing and vacating the Court of Appeals Opinion, and reinstating the Circuit Court Order.

Respectfully submitted,

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